Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, July 20, 2015

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES – SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998: STATUS REPORT BY THE UNITED STATES (WT/DS176/11/ADD.151)

- The United States provided a status report in this dispute on July 9, 2015, in accordance with Article 21.6 of the DSU.

- Several bills introduced in the current U.S. Congress would repeal Section 211. Other previously introduced legislation would modify Section 211.

- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings and resolve this matter with the European Union.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.151)

- The United States provided a status report in this dispute on July 9, 2015, in accordance with Article 21.6 of the DSU.

- The United States has addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.

- With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.126)

- The United States provided a status report in this dispute on July 9, 2015, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.89)

- The United States thanks the European Union ("EU") for its status report and its statement today.

- The United States notes that dozens of biotech applications remain pending in the EU approval system. One of these applications has been pending for well over a decade. The ongoing backlog and delays remain a serious impediment to trade in biotech products.

- The United States is further concerned about an EU proposal for major change in the EU approval measures. If adopted, that measure would result in even greater disruptions in trade in agricultural products.

- As the United States has previously stated, the EU Commission has proposed to adopt an amendment to EU biotech approval measures that would allow individual EU member States to ban the use of biotech products within their territory, even where the EU has approved the product based on a scientific risk assessment. The United States is concerned about the relationship of such a proposal to the EU's obligations under the SPS Agreement.

- Additionally, the United States notes that one or more EU member State bans would serve as a major impediment to the movement and use of biotech products throughout the entirety of the EU.

- The United States urges the EU to ensure that its biotech approval measures operate in accordance with the EU's own laws and regulations and its obligations under the SPS Agreement. To the extent that the EU considers revisions to its biotech approval measures, the EU should ensure that these revisions are consistent with the EU's WTO obligations and should notify these revisions to the SPS Committee pursuant to Article 7 of the SPS Agreement.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.37)

- The United States provided a status report in this dispute on July 9, 2015, in accordance with Article 21.6 of the DSU.

- As we have noted at past DSB meetings, in February 2012 the U.S. Department of Commerce modified its procedures in a manner that addresses certain findings in this dispute.

- The United States will continue to consult with interested parties as it works to address the other recommendations and rulings of the DSB.

2. INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

- We thank India for its communication of July 13, 2015, and its statement today, indicating that it intends to implement the DSB's recommendations and rulings in this dispute, and that it will need a reasonable period of time for implementation.

- The WTO-inconsistent measures here continue to be of significant concern to the United States. We therefore look forward to India moving promptly to bring its measures into compliance with its obligations.

- We stand ready to discuss with India, under Article 21.3(b) of the DSU, a reasonable period of time for implementation of the DSB's recommendations and rulings.

3. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENTS BY THE EUROPEAN UNION AND JAPAN

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that the EU, Japan, and other Members have acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, over seven and a half years ago.

- We therefore do not understand the purpose for which the EU and Japan have inscribed this item today.

- With respect to comments regarding further status reports in this matter, as we have already explained at previous DSB meetings, the United States fails to see what purpose would be served by further submission of status reports which would repeat, again, that the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- Indeed, as these very WTO Members have demonstrated repeatedly when they have been a responding party in a dispute, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented those DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.

4. CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States reiterates its serious concerns regarding China's failure to bring its measures into conformity with its WTO obligations, despite numerous interactions between the United States and China in the DSB and elsewhere.

- China continues to impose its ban on foreign suppliers of electronic payment services ("EPS") by requiring a license, while at the same time failing to issue all specific measures or procedures for obtaining that license.

- The United States previously has taken note of an April 2015 State Council decision, which indicates China's intent to open up its EPS market following issuance of implementing regulations by the People's Bank of China and the China Banking Regulatory Commission.

- The United States notes that People's Bank of China issued draft regulations earlier this month setting forth some procedures for EPS suppliers to follow when seeking a license. The United States is currently reviewing those draft regulations.

- To date, the China Banking Regulatory Commission has not issued any draft or final regulations implementing the State Council's April 2015 decision.

- As a result, one Chinese enterprise continues to be the only EPS supplier able to operate in the domestic market.

- As required under its WTO obligations, China must still adopt the implementing regulations necessary for allowing the operation of foreign EPS suppliers in China. We continue to look forward to the prompt issuance of all measures necessary to permit foreign EPS suppliers to do business in China.

6. UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

A. COMMUNICATION FROM THE EUROPEAN UNION (WT/DS386/38)

- Mr. Chairman, the United States wishes to thank the European Union for inscribing this item and circulating documentation so as to permit Members to reflect on the issue to be discussed and be prepared to contribute to the discussion today. We also would note that it was appropriate for the Secretariat, at the request of the EU, to circulate the EU's communication as part of the document series for the dispute DS386, to which the EU's comments relate. As we have noted previously, we have disagreed with a former view held by the EU that it is *not* appropriate to circulate a Member's communication expressing its views in relation to a dispute in a DS document series.[1] Therefore, once again, we welcome the change in the EU's position on this systemic issue, and agree with its current approach, which conforms with the approach of numerous other WTO Members as well.[2]

- The United States and the European Union cooperate on a great number of procedural and substantive issues in the WTO, including importantly in the area of dispute settlement, and we greatly value that cooperation. But on the issue raised by the EU for discussion today, we respectfully but firmly must disagree. It is evident to us that a plain reading of the relevant DSU text does not permit the meaning asserted by the EU, a view we will elaborate in a moment. To find *that* meaning in text that indicates its *opposite* would, with the best of intentions, amount to amending the DSU. Pursuant to Article X:8 of the Marrakesh Agreement, this, of course, cannot be done without the approval, by consensus, of WTO Members in the Ministerial Conference.

- What is more, there does not appear to be any serious question whether a DSB meeting and decision are needed in order to refer a matter to arbitration under Article 22.6 of the DSU[3]. DSB minutes and past experience show that matters have been referred to arbitration in the past without any DSB action or any DSB item arising under the agenda.[4]

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[1] *See* WT/DSB/M/342, para. 5.17, and WT/DSB/M/254, paras. 74, 77, and 86.

[2] *See, e.g.*, WT/DS245/19 (Statement by Japan), WT/DS296/9 (Statement by Korea), WT/DS320/17 (Communication by the European Union), WT/DS322/16 (Communication by the United States), and WT/DS406/15 (Communication by the European Union).

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[4] *See, e.g.*, WT/DSB/M/233, paras. 1-5 (noting agreement of parties matter had already been referred to arbitration by filing of objection), WT/DSB/M/245, p.2 (noting agreement of parties matter had already been referred to arbitration by filing of objection; request for authorization withdrawn from DSB agenda).

- The DSU text demonstrates why it has already been established that this is the correct reading of Article 22.6. Following a request by a Member under Article 22.2 of the DSU for authorization to suspend concessions or related obligations, the text of the second sentence of Article 22.6 states plainly: "If the Member concerned objects to the level of suspension proposed, …the matter shall be referred to arbitration."

- Thus, the text establishes that referral of the matter to arbitration results as a consequence "if the Member concerned objects", much as, under the second sentence of Article 16.4, an appeal of a panel report results as a consequence "if a party has notified its decision to appeal".

- Members will note that Article 22.6 specifically refers in the *first* sentence to a decision *by the DSB* and furthermore provides that any such decision is by negative consensus. The decision by negative consensus is a departure from Article 2.4 of the DSU, which requires that decisions by the DSB shall be by positive consensus of WTO Members.

- The second sentence of Article 22.6, by contrast, does not contain any reference to a decision by the DSB. Nor does it prescribe any departure from the DSU requirement that any DSB decision is to be taken by a positive consensus.

- The absence in the second sentence of a reference to a DSB decision that is present in the first sentence should be given meaning. It further demonstrates that the referral of the matter to arbitration does not require a decision by the DSB. Instead, the referral occurs by virtue of the objection of the Member concerned.

- Against this setting, the EU suggests that Article 22.6 should be read as though it contained the words "by a decision of the Dispute Settlement Body unless the DSB decides by consensus not to do so."

- However, those words simply do not appear in Article 22.6 of the DSU. And panels and the Appellate Body have repeatedly explained that, consistent with the text-based approach reflected in customary rules of interpretation, and to avoid adding to or diminishing the rights and obligations of Members contrary to DSU Articles 3.2 and 19.2, it is not a correct legal interpretation to read into a WTO provision words that are not there.

- The EU argues that "the phrase 'shall be established' in Article 6 of the DSU means that the panel is established by the DSB, just as the phrase 'shall be adopted' in Articles 16.4 and 17.14 of the DSU means that panel and Appellate Body reports are adopted by the DSB." However, these selective, partial quotations are misleading at best and actually undermine the EU's reading of Article 22.6.

- Although the EU quotes the phrase "shall be established" in Article 6.1 of the DSU, it neglects to point other text in that very provision that speaks to establishment of the panel by the DSB. Indeed, Article 6.1 *explicitly* provides that "a panel shall be established at the latest *at the DSB meeting* following that at which the request first appears as an item on the DSB's agenda, unless *at that meeting the DSB decides* by consensus not to establish a panel." Article 6.1 thus clearly refers to a DSB meeting and decision, just as plainly as the second sentence of Article 22.6 does not.

- Similarly, the phrase "shall be adopted" in Articles 16.4 and 17.14 of the DSU does not mean that there is a DSB decision, standing alone. Rather, Article 16.4 explicitly provides that: "the report shall be adopted *at a DSB meeting* unless a party to the dispute formally notifies the DSB of its decision to appeal or *the DSB decides* by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption *by the DSB* until after completion of the appeal."

- And Article 17.14 expressly provides that: "An Appellate Body report shall be adopted *by the DSB* and unconditionally accepted by the parties to the dispute unless *the DSB decides* by consensus not to adopt the Appellate Body report."

- The language of Articles 16.4 and 17.14 clearly refer to a decision by the DSB, and even a meeting of the DSB. It would be incorrect to ignore, and omit this language when quoting, the parts of these Articles directly relevant to the legal issue presented when relying on those Articles.

- In one further instance of reading into a WTO provision text that is not there, we also note that the EU in its communication refers to the arbitrator as an "arbitration panel". This is inaccurate and again contrary to the text of the DSU. The DSU, particularly in Article 22.7, is clear that the body conducting the arbitration is an "arbitrator." The term "arbitration panel" is nowhere found in Article 22.6 or 22.7, or anywhere else in the DSU.

- With regard to my EU colleague's comments on third party participation, there is no basis in the agreed text of the DSU for a Member who is not a party to the dispute to assert *DSU rights* to participate as a third party in an Article 22.6 arbitration.

- Articles 22.6 and 22.7 make no reference at all to participation as of right by third parties. This is in clear contrast to Articles 10.2 and 10.3 of the DSU providing rights at the panel stage and Article 17.4 of the DSU providing rights at the appeal stage.

- In fact, this is an issue that has also already been addressed in past arbitrations. We are not aware of any arbitrator that has agreed with the EU's views.

- Indeed, past arbitrators have found that Article 10 of the DSU does *not* apply to arbitrations under Article 22.6, and have denied the assertion of third party rights under the DSU in Article 22.6 arbitrations.

- Mr. Chairman, again, we would like to thank the EU for its communication and for the opportunity to engage with the interpretive issues raised there. This discussion may facilitate reflection and discussion by Members on the DSU, as well as ways in which we might enhance its operation and effectiveness. But we consider such enhancements to be ones to be discussed and agreed by Members, and we would not view it as positive or sustainable for the WTO for our agreed rules to be amended otherwise.

10. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDONESIA (WT/DS491/2)

- We are disappointed that Indonesia has chosen to request the establishment of a panel.

- We maintain that the measures identified in Indonesia's request are fully WTO-consistent. Indonesia has even brought a claim on a U.S. legal provision that had no bearing on the investigations and orders mentioned in its panel request. At a time when WTO dispute settlement resources are stretched thin, we do not think that a panel proceeding would be a productive use of those resources.

- For these reasons, the United States is not in a position to agree to the establishment of a panel today.